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Karen S. Townsend

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DUE PROCESS RIGHTS AND HIGH SCHOOL SUSPENSIONS AFTER *GOSS v. LOPEZ*

Karen S. Townsend*

INTRODUCTION

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.[1]

Despite this judicial admonition, and over a vigorous dissent which forecast the adverse effect the decision would have on the quality of education, the United States Supreme Court held in *Goss v. Lopez* that:

> the Due Process Clause of the Fourteenth Amendment requires that a student facing temporary suspensions from a public school be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version.[2]

With this decision, the conflicting holdings of circuit and federal district courts as to the applicability of the due process clause to short suspensions from public schools were resolved.[3]

It will be the purpose of this note to examine the background of the *Goss* decision, to discuss its holding and implications, and to explore its impact on Montana schools.

I. HISTORICAL BACKGROUND

The question of which procedural due process protections are extended to a high school student threatened with a temporary suspension is but one part of "an extremely vague and confusing area" of the law known as student rights.[4] Although the Supreme Court has held that "neither the Fourteenth Amendment nor the

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* Prior to becoming a law student, Karen Townsend had six and a half years' teaching and counseling experience in public high schools in Hawaii and Montana. She holds a M.A. in Counseling Psychology from the University of California.

1. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).
2. Goes v. Lopez, ___ U.S. ___, 95 S.Ct. 729 (1975).
3. *See generally*, cases cited in footnote 8 of Goss v. Lopez, *supra* note 2 at 737-738.
4. *See generally*, STROUSE, JEAN., UP AGAINST THE LAW. THE LEGAL RIGHTS OF PEOPLE UNDER 21. (New American Library 1970).

Bill of Rights is for adults alone"[5] and also that: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[6] "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[7] This recognition by the Court of the authority of school officials has limited the:

> rights of the young in whatever ways judges can be persuaded are necessary to let the family and the school carry out their tasks, and generally speaking, the law in this county has allowed adults to draw the limits to the rights of the young very narrowly.[8]

A series of important court decisions handed down since 1961 has, however, established certain minimum procedural due process guidelines. Although the high school student being disciplined may not take advantage of all the constitutional safeguards provided for the adult criminal defendant, his right to minimum protections has been recognized.

A. Pre-1961

The earlier cases challenging procedures used by school administrators in suspensions or expulsions were brought by college students against the dean, president, or governing board of their *alma mater*. Prior to 1961, these university administrators had a free hand in the disciplinary process. If an infraction occurred, usually a private session with the dean rather than a formal hearing before some administrative board sufficed on the general theory that such a procedure spared the misbehaving student adverse publicity and the counseling that went on in such a session was part of the overall educational process of the university. The injection of any due process requirements into this process was seen as creating an adversarial relationship which was antithetical to the counseling relationship.[9]

There was, in addition, a general reluctance shown by courts to interfere in these matters for two primary reasons. First the university or college was seen as acting *in loco parentis*. Since courts would not step into the disciplinary process between parent and child, they

5. In re Gault, 387 U.S. 1, 13 (1967).
6. Tinker v. Des Moines School District, 393 U.S. 503, 506 (1968).
7. *Id.* at 507
8. Ladd, Edward T., *Civil Liberties for Students—At What Age?* 3 J. L.&ED. 251, 252 (April, 1974).
9. *See generally*, O'Toole, George A. Jr., *Summary Suspension of Students Pending a Disciplinary Hearing: How Much Process is Due?*, 1 J. L.&ED. 383, 383-384 (July, 1972).

could not step in between dean and student. Second, the courts viewed these questions as purely internal affairs of the university, and thus unfit for judicial determination. This attitude was reflected in court approval of dismissals where there had been no hearing at all, or where the hearing was challenged as insufficient or unfair.[10]

Typical of these pre-1961 cases is the 1928 Montana case of *State ex rel. Ingersoll v. Clapp*.[11] In this case, a married woman, who was an honor student, was suspended from the state university at Missoula. She and her husband, also a student, allegedly held parties where liquor was served in their home, without a chaperone approved by the Dean of Women. One particular party allegedly occurred after the annual Barristers' Ball. The Montana Supreme Court held that Mrs. Ingersoll was not entitled to a hearing and notice of the charges against her.[12]

In a case decided one year later, the *Ingersoll* case was cited as standing for the proposition:

> That the courts will not interfere with the discretion of school officials in matters which the law has conferred to their judgment, unless there is a clear abuse of that discretion, or arbitrary or unlawful action. . . .[13]

B. The Dixon Case and Its Impact

Judicial deference to the university's sense of fair play ended with the 1961 Fifth Circuit decision of *Dixon v. Alabama State Board of Education*.[14] The *Dixon* case held that a public university must notify a student in writing of the precise charge against him and provide him with the opportunity for a fair hearing that would meet certain requirements before he could be expelled.[15] The case found that the student's interest in his continued education, whether a right or a privilege, was an important one, and the Fourteenth Amendment required the university to act in accordance with the principles of due process when it threatened to harm that interest.[16]

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10. *Id.* For example *see*: Dehaan v. Brandeis University, 150 F. Supp. 626 (D. Mass. 1957); People ex rel. Bleutt v. Board of Trustees, 10 Ill. App.2d 207, 134 N.E.2d 635 (1956); Barker v. Bryn Mawr College, 272 Pa. 121, 122 A. 220 (1923).

11. State ex rel Ingersoll v. Clapp, 81 Mont. 200, 263 P. 433, *cert. den.* 277 U.S. 591, *error dismd.* 278 U.S. 661 (1928).

12. *Id.* at 215-216.

13. Kelsey v. School District No. 25, 84 Mont. 453, 276 P. 26, 27 (1929).

14. Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961); *cert. denied*, 368 U.S. 930 (1961).

15. O'Toole, *supra* note 9 at 385.

16. Dixon v. Alabama State Board of Education, *supra* note 14 at 156.

The test of due process used in the *Dixon* case was the test articulated in Mr. Justice Frankfurter's concurring opinion in *Joint Anti Facist Refugee Committee v. McGrath*.[17] By applying the Frankfurter test that the government's interest be balanced against the interest of the affected individual in *Dixon*, the Court concluded that there were no compelling reasons for not "exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense."[18]

Following the *Dixon* case, the lower federal courts uniformly held the due process clause applicable to decisions to remove a student from a public educational institution for a period of time long enough to be classified as an expulsion.[19] Some of these decisions raised the issue of the applicability of due process at the high school level and held that the same requirements must be followed at the local high school when the penalty being imposed was expulsion.[20] The question of that clause's applicability to the short suspension was, however, undecided until the decision in *Goss v. Lopez*.

II. Goss v. Lopez

A. *The Case*

The *Goss* case reached the Supreme Court as an appeal from a three-judge District Court ruling that the students had been denied due process of law in violation of the Fourteenth Amendment because they had been "suspended without hearing prior to or within a reasonable time thereafter."[21] The suit, brought as a class action by nine named appellees, sought a declaration that the Ohio statute permitting suspension of pupils for misconduct for up to ten days[22] was unconstitutional. The appellants in the case, various administrators of the Columbus, Ohio, Public School System, sought reversal of the three-judge panel on the grounds that the due process clause of the Fourteenth Amendment was not applicable to public school suspensions because there is no constitutional right to an education at public expense, or, in the alternative, that the loss of

17. Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123 (1951).
18. Dixon v. Alabama State Board of Education, *supra* note 14 at 157.
19. *See* note 3, *supra* footnote 8 of Goss v. Lopez.
20. *See generally*, Fiedler v. Board of Education of School District of Winnebago, 346 F. Supp. 722 (Neb. 1972); DeJesus v. Penberthy, 344 F. Supp. 70 (Conn. 1972); Voght v. Van Buren Public Schools, 306 F. Supp 1388 (E.D. Mich 1969).
21. Lopez v. Williams, 372 F. Supp. 1279, 1302 (S.D. Ohio E.D. 1973).
22. Ohio Rev. Code § 3316.66 (1972).

up to ten days is neither a severe detriment to nor grievous loss of liberty.[23]

The students in the case attended three different Columbus, Ohio, schools. They were suspended for various reasons, including "disruptive or disobedient conduct committed in the presence of the school administrator," demonstrating in the school auditorium while a class was being conducted and refusing to leave when so ordered, physically attacking a police officer, and a lunchroom disturbance which involved damage to school property.[24] None of the students was given a hearing to determine the operative facts underlying the suspension. One of the students testified that he was suspended together with at least 75 others for the disturbance in the lunchroom, but that he had not been party to the destructive conduct and was, in fact, an innocent bystander.[25]

B. The Majority Opinion

The Court rejected the appellant administrators' first argument that the due process clause was inapplicable because there is no constitutional right to an education at public expense. The Court reiterated the position it had taken in earlier decisions that:

> The Fourteenth Amendment forbids the States to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits.[26]

Here, Ohio's statutory scheme directing "local authorities to provide a free education to all residents between six and 21 years of age," and providing for compulsory attendance, created the property right.[27] The Court also found the suspension caused a deprivation of liberty by including the student's reputation as part of that concept: " 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the clause must be satisfied."[28]

Appellants' second argument, that a suspension of up to ten days did not subject the student to a "severe detriment or grievous loss" and thus did not require the protections of the due process

23. Goss v. Lopez, *supra* note 2 at 735-736.
24. *Id.* at 734.
25. *Id.*
26. *Id.* at 735.
27. *Id.*
28. *Id.* at 736.

clause, was also rejected. Relying on *Board of Regents v. Roth*,[29] the Court reiterated the necessity of looking not to the "weight" but to the "nature" of the interest at stake to determine whether due process requirements apply. Continuing, the Court concluded that a ten-day suspension from school is not *de minimis* and therefore the due process clause applies.[30]

Having found the due process clause applicable, the Court proceeded to decide the question: "What process is due?" Following the precedents of *Cafeteria Workers v. McElroy*[31] and *Morrissey v. Brewer*,[32] the Court found that at the "minimum students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing."[33] Continuing the analysis of *Cafeteria Workers* and *Morrissey*, the Court then examined and attempted to accommodate the competing interests involved. It found the student's interest to be that of avoiding an unfair or mistaken exclusion from the educational process with all of its unfortunate consequences. The school's interest was identified as a need for an effective and flexible disciplinary system. Although such an interest was found to be important, it was not strong enough to outweigh protection of the student's interest.[34]

The Court concluded by outlining the minimum requirements necessary to satisfy the due process clause in school disciplinary suspensions. A student threatened with a suspension of ten days or less must "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[35] The Court stated that "as a general rule notice and hearing should precede removal of the student from school."[36] They recognized, however,

> [T]hat there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable. . . .[37]

29. Board of Regents v. Roth, 408 U.S. 564 (1972).
30. Goss v. Lopez, *supra* note 2 at 737.
31. Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).
32. Morrissey v. Brewer, 408 U.S. 471 (1972).
33. Goss v. Lopez, *supra* note 2 at 738.
34. *Id.* at 739-740.
35. *Id.* at 740.
36. *Id.*
37. *Id.*

The majority opinion characterizes the requirements for notice and hearing in its concluding statements:

> In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fairminded school principal would impose upon himself in order to avoid unfair suspensions.[38]

C. *Justice Powell's Dissent*

The dissent disagrees with this characterization of the majority opinion in emphatic language. Mr. Justice Powell, writing for the dissent,[39] warns that "the decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education."[40] He concludes: "No one can foresee the ultimate 'thicket' the Court now enters. Today's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions in the educational process."[41]

Justice Powell reasons that "a student's interest in education is not infringed by a suspension within the limited period prescribed by Ohio law. Moreover, to the extent that there may be some arguable infringement, it is too speculative, transitory and insubstantial to justify imposition of a *constitutional* rule."[42] He articulates three major criticisms of the majority opinion. First, he finds a misreading of the cited precedents. It is his contention that a "severe detriment or grievous loss" is required in order to trigger due process protections.[43] Second, he argues that "wide latitude with respect to maintaining discipline and good order" is necessary for daily operation of public schools.[44] Finally, he claims that the proper role of the judiciary is one of limited supervision of public education.[45] Justice Powell fears the institution of due process requirements into short-term suspensions will ultimately inject an adversarial atmosphere into the educational process.[46] He cautions that future courts following the rationale articulated in the majority opinion may decide that a school's grading practices, promotion policies, requirements for participation in extra-curricular activities, or grouping decisions

38. *Id.*
39. The Chief Justice, Mr. Justice Blackmun, and Mr. Justice Rehnquist joined former school board member Mr. Justice Powell in his dissent.
40. Goss v. Lopez, *supra* note 2 at 741.
41. *Id.* at 747.
42. *Id.* at 742.
43. *Id.* at 743.
44. *Id.* at 744.
45. *Id.*
46. *Id.* at 746.

must also satisfy due process procedures.[47]

Justice Powell's criticisms and fears are reminiscent of those expressed by adherents of the counseling rationale manifested in the university discipline of the pre-*Dixon* era, or those held by opponents to the extension of due process protections to juvenile offenders rejected by the Court in *In re Gault*.[48] One commentator's observations about the *Gault* decision are equally applicable to *Goss*: "The Court also demonstrated that a desire to help—the rehabilitative ideal—no longer will serve as the incantation before which procedural safeguards must succumb."[49] Unlike Justice Powell, the majority in *Goss* recognizes "a benevolent purpose too often is a mask for arbitrary procedures."[50] Such arbitrary procedures can occur with equal frequency in either the high school discipline process or the juvenile court.

III. Impact In Montana

Present Montana statutes on suspensions and expulsions are in no conflict with the *Goss* decision.[51] The individual policies adopted by various Montana school districts may, however, have to be changed to meet the decision's requirements. Conversations with several Montana educators would indicate that at least some school districts not only meet these requirements, but in fact have instituted stricter policies in order to provide more protection for their students.[52]

Precisely what does *Goss* require of schools? The case suggests the following considerations for school policies:

I. *Scope*. *Goss* requires due process procedures in only three kinds

47. *Id.* at 747-749. Mr. Justice Powell reiterates this warning in his dissent from Part II of *Wood v. Strickland*, ___U.S. , 95 S.Ct. 992,1004 (1975) at n.3.

48. In Re Gault, *supra* note 5.

49. Cohen, Fred. *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempha v. Rhay*, 47 Tex. L. Rev. 1, 4 (1968).

50. *Id.*

51. Revised Codes of Montana, § 75-6109, 75-6113 (1947) give teachers or district superintendants or principals authority to suspend pupils "for good cause." Section 75-6311 directs district trustees to "adopt a policy defining the authority and procedure to be used by a teacher, superintendant, or principal in suspending a student and to define the circumstances and procedures by which the trustees may expel a pupil."

52. A telephone interview with Mr. Lou Gappmayer, principal of Bozeman Senior High School, and personal interviews with Mr. Gene Leonard, Vice-Principal of Sentinel High School and Mr. Dwight Hopkins, Vice-Principal of Hellgate High School during February of 1975 all revealed no need for their schools to make any changes in present suspension procedures as a result of *Goss*. A telephone call to Mr. Carroll Blend, counsel to the office of the Superintendent of Public Instruction for the state of Montana indicated that he has had some inquiries on the decision, but foresaw no real impact on Montana. He was considering the possibility of making some statement on the decision in a future copy of the monthly newsletter sent to all public school employees.

of actions: expulsions, suspensions, and other disciplinary measures of similar severity.[53]

II. *Procedure*. In acting in any of the above matters, the school must provide the student with notice of the alleged wrongdoing and an informal hearing to consider the wrongdoing.

A. *Effective Notice* requires two steps:

1. Promulgation of school rules clearly stating what behavior is expected of students.[54]
2. Notification to the student wrongdoer stating which rule he has broken.[55]

B. *Hearing*. The hearing must give the student an opportunity, formally or informally, to discuss the alleged wrongdoing. Prior to a *suspension*, the hearing must:

1. include the school's statement of the facts;
2. include the student's statement of the facts;
3. have both the student and the disciplinarian present;[56]
4. take place *before* the school's action against the student, unless the student's presence is a "continuing danger" or "ongoing threat" in which case the hearing must take place within 72 hours of the student's suspension.[57]

Prior to an *expulsion*, more formal procedures may be required.[58]

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53. Although Justice Powell makes a dire forecast of the eventual application of due process requirements to other discretionary decisions such as grading and ability grouping, (*see* Goss v. Lopez, *supra* note 2 at 747-748) such a conclusion is not readily apparent from the limitations placed in the majority opinion by Mr. Justice White. His opinion speaks of *disciplinary* decisions made in an educational setting, and not to the myriad of other decisions school personnel must make. Certainly Mr. Justice Powell is not suggesting that grades are or should be used as disciplinary measures. There is clearly a qualitative difference between a decision to suspend or expel a student, and one to give him a poor grade or deny him a class change. *Goss* applies to the former and not to the latter.

54. This requirement can be easily met by preparing a student handbook containing all the school rules and policies which should then be distributed to all new students. Many schools take time to cover their school rules in a new student orientation program, or in the freshmen or sophomore English classes.

55. The *Goss* decision permits this requirement to be satisfied by oral or written notice. Written notice would serve as a protection for the school in the event of a future challenge based on the grounds of ineffective notice.

56. Although the *Goss* decision does not require that parents be present at the hearing, many schools do permit parents to attend if they wish. The *Goss* majority also say that the school official *may* wish to allow others at this hearing if the case is complex. Others who might also attend, but whose presence is not mandatory are: "the accuser," "the student's own witnesses," or "counsel for the student" (*See* Goss v. Lopez, *supra* note 2 at 741).

57. Goss v. Lopez, *supra* note 2 at 735.

58. *Id.* at 741. The more formal requirements which most likely would be necessary are: written notice of the charges delivered to the student and parent in sufficient time to prepare a defense, a minimum of two days, which informs the student of the regulation violated; the evidence and witnesses the school will produce; a formal hearing before the board of trustees; and assistance of retained counsel if desired. This hearing must take place before the student is expelled.

III. *Penalty.* If these procedures are not followed, the school officials involved may be subject to a suit for damages by the student.[59]

The due process procedures required by the *Goss* decision are not excessive. Their uniform adoption by Montana schools should guarantee that school discipline is administered with basic fairness. There is no suggestion in the decision that the schools lack authority to discipline. The Court emphasizes, however, that any discipline administered must satisfy due process requirements. The erection of these barriers against arbitrary decisions or mistaken conclusions should serve not to break down rapport between school officials and students, but to increase the respect that each group has for the other.

59. Wood v. Strickland, *supra* note 47.